IN THE

Supreme Court of the United States

October Term, 1963

No. 421

United States of America and Interstate Commerce Commission, et al., *Appellants*

v.

Emma Shannon and Richard J. Shannon, d/b/a E. and B. Shannon, *Appellee*

On Appeal From the United States District Court for the Western District of Texas—San Antonio Division

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Common Carrier Conference—Irregular Route requests leave to file the accompanying Brief Amicus Curiae in behalf of the position taken by the Interstate Commerce Commission in this case.

The Common Carrier Conference—Irregular Route of the American Trucking Associations, Inc., is comprised of 508

common carriers holding certificates of public convenience and necessity issued by the Interstate Commerce Commission. These motor carriers serve the shipping public over irregular routes. Members of this conference operate from a few up to several hundred units and provide a valuable common carrier service to the great bulk of the shipping public in this nation.

Our common carrier system, of which this association comprises an important part, seeks to protect itself from the serious inroads which this case would make on present ability to serve the entire shipping public regardless of size or ability to pay. The rule of the lower court is contrary to policy consistently followed by the Commission in accordance with the legislative dictates of Congress and seriously undermines the foundations of every one of the over 500 common carriers of this conference.

BRIEF FOR THE COMMON CARRIER CONFERENCE —IRREGULAR ROUTE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., AMICUS CURIAE

I.

SUBSTANTIALITY OF THE QUESTION

If the rule of the lower court in this case were allowed to stand, years and years of effort on the part of Congress and the Interstate Commerce Commission to develop and preserve a strong common carrier system would be destroyed. Our common carrier system has enabled even the smallest entrepreneur to obtain transportation and avoid the insidious menace of a private transportation monopoly such as was seen in *Standard Oil Company of New Jersey* v. *United States*, 221 U.S. 1 (1911).

The District Court decision in this case represents no more than a superficial understanding of the crucial role which a common carrier system plays in the preservation of a healthy free enterprise system. Congress amended

Section 203(c) of the Interstate Commerce Act in August of 1958 in order to give complete legislative sanction to the policy which the Commission has consistently followed to prevent the siphoning off of traffic from regulated for-hire carriers by "businesses which use their own trucks to deliver their own merchandise, [and which] are purchasing goods at or near the final point of delivery of their own merchandise, and transporting such goods to places near their own establishments for sale to others." Congress specifically condemns the type of operations being conducted in this case, further saying,

> "Such transportation is usually performed solely for the purpose of receiving compensation for the otherwise empty return of their trucks . . . this pseudo-private carriage is a subterfuge for engaging in public transportation without complying with the certificate or permit requirements of the Interstate Commerce Act."

See House Report No. 1922, 85th Congress, 2d Sess., of the Committee on Interstate and Foreign Commerce on R. 12832 relating to amendment of Section 203(c) of the act.

Therefore Section 203(c) of the act was amended in August, 1958 to the effect that no carrier in absence of specific legislative exemption shall operate without a certificate or permit issued by the Interstate Commerce Commission authorizing motor vehicle transportation in interstate or foreign commerce. Specifically it said,

> "Nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person."

II.

NATURE OF THE ERROR

The opinion of the United States District Court for the Western District of Texas, San Antonio Division, in this case referred to below as *Emma Shannon and Richard J. Shannon d/b/a E. and B. Shannon v. United States of America and Interstate Commerce Commission*, Civil Action No. 2840 (1963) omits any mention of Section 203(c) of the Interstate Commerce Act. It commits complete and serious error. It contravenes Congressional intent that private carriage be restricted to "such transportation . . . within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person."

The manner in which the lower court relates the facts of this case indicates the true significance of its failure to include any reference to Section 203(c) of the act. The major facts which the District Court marshals behind its decision are (1) the small percentage of investment in transportation facilities, (2) purchase of the sugar, (3) responsibility for damage or loss, (4) sales made on credit, (5) no identifiable transportation charges, and (6) no holding out to the general public of for-hire motor carrier services.

Despite these indicia of private carriage, the Commission and Congress have looked through this false mask and ruled that the purchase and sale of sugar to fill otherwise empty backhaul movements is not in furtherance of the primary business purpose of the transporter. Congress in Section 203(c) has codified in very explicit terms prohibition against this siphoning of business from the common carrier system. Congress found it to be detrimental both to the common carriers themselves and ultimately to the shipping public.

It has made a distinct choice in favor of the common carrier system over the interest of private carriers in

obtaining compensation in their backhaul movements. These private carriers are able to pick and choose the business which they transport at their own will, but common carriers owe a duty to the public as prescribed by Congress to publish tariffs and in accordance with those tariffs provide service to shippers whether large or small, profitable or unprofitable.

The crucial fact in this case is the appellee's admission that their *principal reason for purchasing sugar in Louisiana is to provide a backhaul in connection with outbound movements of live stock and other commodities from San Antonio.* (81 M.C.C. pp. 341, 343, 346) This is precisely the conduct which Congress condemns by amending Section 203(c) of the act, and thereby places within 206(a), prohibiting common carriers from operating without a proper certificate or 209(a), prohibiting contract carriers from operating without a proper permit. Thus Congress has clearly prescribed that motor carriers must choose one of the three separate categories, (1) private, (2) contract, and (3) common carrier, all of which are clearly defined within the bounds of due process. Appellee in this case is at no disadvantage in determining what steps it must take to comply with the law.

III.

GROUNDS FOR REVERSAL

The purpose of the Transportation Act of 1958, which included the above quoted amendment to the Interstate Commerce Act, was to aid our common carrier system. See House Report No. 1922, 85th Cong., 2d Sess., p. 2. *Church Point Wholesale Beverage Company v. United States*, 200 F. Supp. 508 (W.D. La. 1961) furnishes a complete discussion of the historical background of the primary business test as codified in Section 203(c) of the act and ample logic and precedent for reversing the decision entered below in this case.

In *Morgan Packing Company, Inc.,—Investigation of Operations*, 92 M.C.C. 48, 51 (May 1, 1963), the Interstate Commerce Commission issued a cease and desist order similar to the one in the instant case. The *Morgan* case indicates the devastating effect that the common carrier system would suffer if the rule of this case were to be allowed to stand. The Commission therein found,

> "In its fiscal year ended June 30, 1960, Morgan bought approximately 25,692,730 pounds of sugar for resale and its gross sugar sales amounted to about $2,500,000 or less than ten percent of total company sales. During that same period, slightly more than 5,000,000 pounds of sugar were purchased for company use in its packing plant and in excess of 300,000 pounds were retailed in its Austin supermarket."

Therefore the Morgan Packing Company was providing no more than mere transportation in the guise of a "purchase-and-sale", "loss-leader" transaction involving more than 20,000,000 pounds of sugar in excess of its own marketing requirements. This cane sugar was purchased and transported by the Morgan Packing Company from approximately seven sugar refineries located along the East Coast from Boston, Mass. to Jacksonville, Fla.; and in the New Orleans area. This transportation was provided to the West and Midwest, where there are no cane sugar refineries.

This "primary business" test is by no means limited to the transport of sugar, but the vast effect of the erroneous rule in this case is illustrated by the Commission's decision in the *Morgan Packing Company* case. It extends to the entire range of commodities transported by every motor common carrier.

CONCLUSION

The issue presented is so substantial and compelling as to require full consideration, reversal and remand, upholding the order of the Interstate Commerce Commission.

Respectfully submitted,

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